IN THE

Supreme Court of the United States

October Term, 1963

No. 167

SIDNEY J. UNGAR,

Appellant,

against

Honorable JOSEPH A. SARAFITE, Judge of the Court of General Sessions of the County of New York,

Appellee.

MOTION TO DISMISS

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Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, appellee moves to dismiss the appeal in the above-entitled action on the ground that it is not within the jurisdiction of this Court because not taken in conformity to 28 U. S. C. §1257(2) and on the ground that it does not present a substantial federal question.

Jurisdiction

The appellant seeks to invoke this Court's jurisdiction under 28 U. S. C. §1257(2) by contending that Sections 750 and 751 of the Judiciary Law of the State of New York are unconstitutional as applied to the appellant. However, throughout the proceedings below the appellant contended only that the procedure adopted by the trial court violated his constitutional rights. See, Appellant's brief to the New York Court of Appeals, pp. 5-20; Appellant's brief to the New York Supreme Court, Appellate Division—First Department, In the Matter of The Criminal Contempt of Sidney J. Ungar, pp. 18-40. Neither in the contempt proceeding, nor in his three briefs to the Appellate Division, nor in his brief to the Court of Appeals did the appellant ever contend that either Section 750 or Section 751 of the Judiciary Law of the State of New York on its face, as construed, or as applied, is invalid under the United States Constitution. That the validity of the statutes was not raised in the state courts is also evident from the order of the New York Court of Appeals directing that the remittitur be amended, which states:

> Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz: Whether the rights of the appellant to due process under the Fourteenth Amendment to the Constitution of the United States were violated. The appellant argued that such rights were violated by (1) the trial judge's refusal to grant an adjournment of the contempt proceeding upon proof of the engagement of his counsel; (2) the trial judge's invoking of summary power under §751 of the Judi-

ciary Law seven days after the end of the trial during which the contempt was committed, and (3) the same trial judge's presiding in the resulting contempt proceeding even though he was the judge "personally attacked".

The Court of Appeals held that appellant's contemptuous remarks were not a personal attack upon the trial judge, and that in no way was there a denial of any constitutional rights of appellant.

The following decisions hold that where the validity of the statute is not "drawn in question" by an explicit and timely insistence in the state courts that the statute, as applied, is repugnant to the United States Constitution, this Court has no jurisdiction under 28 U. S. C. §1257(2) and the appeal must be dismissed. *Slagle* v. *Ohio*, 366 U. S. 259 (1961); *Rohr Aircraft Corp.* v. *San Diego County*, 362 U. S. 628 (1960); *Anonymous* v. *Baker*, 360 U. S. 287 (1959); *Hanson* v. *Dinckla*, 357 U. S. 235 (1958); *Wilson* v. *Cook*, 327 U. S. 474 (1946); *Charleston Federal Savings & Loan Assn.* v. *Alderson*, 324 U. S. 182 (1945); *Memphis National Gas Co.* v. *Beeler*, 315 U. S. 649 (1942).

Statement

The appellant, an attorney, was adjudged guilty of criminal contempt by the respondent and sentenced to pay a fine and serve a 10 day jail term. The judgment was affirmed by the Appellate Division of the Supreme Court of the State of New York and by the New York Court of Appeals. The contempt was committed by the appellant when he shouted in a loud, angry, and insolent tone, in the presence and hearing of the court and jury,

"I am being coerced and intimidated and badgered. The Court is suppressing the evidence,"

while appearing as a witness in the trial of Hulan E. Jack (27-30, 127-9).* In his brief to the New York Court of Appeals, the appellant concedes that this constitutes a *prima facie* contempt (Appellant's brief to the New York Court of Appeals, p. 2).

In the early part of 1960, Hulan E. Jack, then Borough President of Manhattan, was charged in a four-count indictment with the crimes of conspiracy and violations of the New York City Charter. In substance, the indictments read as follows: The first count accused Jack of conspiring with the appellant and others to obstruct justice by concealing the appellant's payments to a contractor for renovation of Jack's residence; the second and third counts pertained to Jack's violating the New York City Charter by accepting gifts or loans from a person—the appellant—interested in matters involving payments from the New York City Treasury; the fourth count charged Jack with a similar violation, accepting gratuities from a person—the appellant—whose business activities were subject to Jack's official actions. Two trials ensued. Both were presided over by the respondent and the second resulted in a conviction of Hulan E. Jack.

The appellant, who had received immunity, was called as a witness by the People at both trials. A long-time friend of the defendant and hostile to the People, the appellant was uncooperative, unresponsive, and disrespectful,

* References, unless otherwise indicated, are to folios in the Record on Appeal filed in the Court of Appeals.

refusing to answer proper questions, volunteering irrelevant matter, asserting that he had no knowledge or recollection of pertinent matters which were clearly known to him, and cavilling about the form of certain questions. Numerous instances of such conduct are set forth in the order to show cause (31-129). When the appellant persisted in this manner despite repeated warnings by the court, the judge recessed the trial, retired to the Judge's Robing Room, and out of the hearing of the jury, stated:

> The Court: Now, Mr. Witness, this case was tried once before and took considerable time. You were a witness for many days. A number of incidents occurred in that trial which, in my judgment, directly tended to interrupt the proceedings of the Court and to impair the respect due to the authority of the Court, and you were the one who created those incidents, in my judgment.
>
> I told you then, at the first trial, that you were creating a very serious problem for the Court and that as a lawyer, I assumed you knew what the problem was.
>
> I should like very much to avoid any repetition of what happened last time.
>
> We each have a function to perform here. Whether it is an agreeable function or a disagreeable function is of no concern.
>
> Now I have said to you up to now on a number of occasions that you should confine your answers to the questions, not to volunteer, not to get into any dispute or discussions, not to try to indicate what you think the question should be or how you should answer it.
>
> This is a trial before a jury, not before a Court, alone. As a judge, I must rule in accordance with my understanding of the law, which I am doing.
>
> • • •

The Witness: I have got to understand the question, in order to answer it. I can't answer a question merely if Your Honor says, "Answer it," if it doesn't make sense to me or if it is creating a false impression—

The Court: Will you desist. You see, it's none of your business whether it creates in your judgment a false impression or not. The defendant is represented here by a lawyer, and the People are represented by a lawyer. It is for them to conduct this litigation, and not you.

Now I am only going to make one more statement and we will return to the courtroom.

There is a rule of law that every man is presumed to intend the natural consequences of his act. I am going to hold you to that standard.

• • •

[A]s a lawyer you certainly know the rules of law of evidence (100-107).

Nevertheless, the appellant maintained his original course of conduct, which culminated in his shouting at the court in the presence of the jury the statement above quoted, for which he was held in contempt.

The Contempt Proceeding

The court immediately informed the appellant that he was "not only contemptuous but disorderly and insolent" (917). When the appellant completed testifying he was directed by the court to keep himself available for future action concerning his contemptuous conduct:

The Court: Now Mr. Witness, with regard to your conduct as a witness in this case, the Court is deferring action until the completion of this trial. Please hold yourself available at that time (1326).

At the subsequent hearing, the court stated that the reason he had not held petitioner in contempt immediately was that he did not want to take any action during the trial which might tend to diminish in the slightest the rights of the defendant to a fair trial (136-8, 154).

Having deferred action until the end of the trial, the court gave the appellant five days' written notice of the charges against him, including a list of numerous other incidents evidencing the persistence and deliberateness of his conduct, and an opportunity to present a defense (136-8, 154-6). At the inception of the hearing, an adjournment was requested on the ground that counsel whom appellant had retained was engaged in another matter (133-4). The court granted a recess of several hours to permit counsel himself to argue for an adjournment (131, 140-3). When counsel appeared he informed the court that at the time of his retainer by the appellant he was already engaged in the other matter and that he had told the appellant that he could not represent him unless he obtained an adjournment (144-52). The court declined to grant an adjournment, stating that the appellant, knowing his conduct had been considered contemptuous and having been informed of the imminency of the contempt proceeding, should not have retained an attorney who could not represent him (152-8). After introducing certain evidence himself (Ct. Exh. 1, at 158-60, reproduced at 205-30; Ct. Exh. 2, at 161; Ct. Exh. 3, at 161-2, reproduced at 232-1334), the court gave the appellant an opportunity to show cause why he should not be held in contempt (162-3). Declaring that he did not wish anything he said to be taken as participation by him in the hearing on the merits (163), the appellant made a statement addressed to the court's authority to hold him in contempt in a summary proceeding and to its denial of

an adjournment (163-80). It was only after he had been adjudged in contempt that he belatedly requested an adjournment to produce evidence (200), which he easily could have had ready for the hearing.

No Substantial Federal Questions are Presented

(1) The appellant's conduct constituted contempt of court

In his brief to the New York Court of Appeals, the appellant conceded that his conduct, if deliberate, constituted a *prima facie* contempt (Appellant's brief to the New York Court of Appeals, p. 2). Appellant's contemptuous intent is manifest in thirteen incidents in his testimony during the two days of the trial which preceded the single utterance for which he was cited. These incidents were set forth in excerpts recited in the order to show cause and referred to in the mandate of commitment. The thirteen extracted portions of the appellant's testimony contain: unresponsive answers to proper questions (47, 74, 76, 85, 98, 119-21); unsolicited interjections of irrelevant comments and explanations (50-1, 57, 66, 69); assertions of inability to recall matters apparently within the appellant's knowledge (59, 78-9, 114-6, 120); interruptions to cavil about the form of the questions (44-5, 61-2, 113-4); and refusals to answer yes or no to questions susceptible to an unqualified answer (67-8, 96). These incidents, considered in light of the fact that the appellant had engaged in similar conduct at a previous trial and had been specifically warned not to do so again, provide ample evidence of deliberate contempt. Moreover, the record can never convey "the complete picture of the courtroom scene. It does not depict such elements of misbehavior as expression, manner

of speaking, bearing, and attitude . . . ." *Fisher* v. *Pace*, 336 U. S. 155, 161 (1949). Therefore, particular reliance must be placed on the fairness and objectivity of the presiding judge.

In view of his concession in the New York Court of Appeals that his conduct constituted a *prima facie* contempt, the appellant's contention here that Section 750 of the New York Judiciary Law is vague as construed and as applied, is hardly tenable.

(2) A summary adjudication of contempt was proper

New York law provides that "contempt, committed in the immediate view and presence of the court, may be punished summarily" (Judiciary Law of New York, Section 751). The necessity for the exercise of such summary power has long been recognized in the law, and its use was very early sanctioned by this Court. *Ex Parte Terry*, 128 U. S. 289 (1888). The contention that it is violative of due process was specifically rejected in *Fisher* v. *Pace*, *supra*, 336 U. S. 155, 159-60, the Court stating,

> This attribute of courts is essential to preserve their authority and to prevent the administration of justice from falling into disrepute. Such summary conviction and punishment accords due process of law.

It is not disputed, and indeed could not be, that the conduct for which the appellant has been cited for contempt occurred in the immediate view and presence not only of the court, but of the jury, the public, and the press present in the courtroom. Consequently there can be no doubt that the court had the lawful power to punish the appellant summarily for criminal contempt.

(3) The question presented by the appellant's contention was decided by this Court in *Sacher* v. *United States*

Although articulated in several different ways, essentially the appellant's contention is that a summary adjudication of contempt after the termination of the trial in which the contempt occurred is violative of due process. Substantially the same question was decided by this Court in *Sacher* v. *United States*, 343 U. S. 1 (1952). Sustaining the trial court's power to defer punishment till the end of a nine month trial, this Court wrote:

> We think "summary" as used in [Rule 42(a), Fed. R. Crim. Proc.] does not refer to the timing of the action with reference to the offense but refers to a procedure which dispenses with the formality, delay and digression that would result from the issuance of process, service of complaint and answer, holding hearings, taking evidence, listening to arguments, awaiting briefs, submission of findings, and all that goes with a conventional court trial. The purpose of that procedure is to inform the court of events not within its own knowledge. The Rule allows summary procedure only as to offenses within the knowledge of the judge because they occurred in his presence.
>
> Reasons for permitting straightway exercise of summary power are not reasons for compelling or encouraging its immediate exercise. Forthwith judgment is not required by the text of the Rule. Still less is such construction appropriate as a safeguard against abuse of the power.
>
> * * *
>
> We hold that Rule 42 allows the trial judge, upon the occurrence in his presence of the contempt, immediately and summarily to punish it, if, in his opinion,

delay will prejudice the trial. We hold, on the other hand, that if he believes the exigencies of the trial require that he defer judgment until its completion he may do so without extinguishing his power." 343 U. S. 1, 10-11.

Several recent cases have followed *Sacher*. See *United States* v. *Panico*, 308 F. 2d 125 (2d Cir. 1962); *United States* v. *Galante*, 298 F. 2d 72 (2d Cir. 1962); *Appeal of Levine*, 95 A. 2d 222, 372 Pa. 612 (Pa. Sup. Ct. 1953).

The soundness of this decision, permitting the Judge to defer the exercise of his summary contempt power till the completion of the trial, is again demonstrated by the facts of the instant case. The trial was a very sensitive one. The appellant had testified that he had been a close friend of the defendant for more than twenty years (287), and the appellant and the defendant had been named co-conspirators in the indictment. For the court to have punished the appellant for contempt during the course of the trial almost certainly would have affected the jury. Since Ungar was not only a People's witness, but closely identified with the defendant, a strong indication of judicial displeasure toward him might have prejudiced the defendant. While it might have been done out of the presence of the jury, in the words of Justice Jackson, "Only the naive and inexperienced would assume that news of such action will not reach the jurors." *Sacher* v. *United States*, *supra*, 343 U. S. 1, 10.

The appellant would distinguish *Sacher* on the ground that in the instant case the adjudication of contempt was not made immediately upon the conclusion of the trial, as

in *Sacher*, but several days after its completion. Nothing in the language or reasoning of that decision so limits it, however. Nor does the appellant indicate that he was in any way prejudiced by the procedure adopted by the court. On the contrary, he received written notice of the charge against him and several days to prepare an explanation—privileges to which he was not entitled under *Sacher*. The appellant was specifically warned at the time the contempt occurred that his conduct was considered contemptuous. Therefore, as stated in *Sacher*, 343 U. S. 1, 10-11, "No claim can be made that the judge awaited the close of the trial to pounce upon [him] for an offense unnoted at the time it occurred."

The appellant also asserts that *Sacher* v. *United States*, *supra*, was overruled by *Offutt* v. *United States*, 348 U. S. 11 (1954). Nothing in the Court's opinion in *Offutt* supports such an assertion. Indeed, Justice Frankfurter, writing for the majority in *Offutt*, begins his discussion of the applicable law with the statement, "We shall not retrace the ground so recently covered in the *Sacher* case . . ." 348 U. S. 11, 13. The decision in *Offutt* is based on a finding that there was a "continuous wrangle" between the court and counsel and that the trial court's adjudication of contempt was infused with personal animosity. In *Offutt*, the judge's personal embroilment with counsel was so extensive that the Court of Appeals reduced the sentence imposed on counsel for his contempt on the ground that the contempt was provoked by the judge. In the instant case the trial court's conduct was not motivated by personal enmity. The trial judge indicated that he did not consider the appellant's contemptuous conduct as a per-

sonal affront but as an obstruction to the due administration of justice (183-4, 187), and the New York Court of Appeals held "that appellant's contemptuous remarks were not a personal attack upon the trial judge * * *" Moreover, the decision in *Offutt* was specifically based on the Supreme Court's "supervisory authority over the administration of criminal justice in the federal courts," *Offutt* v. *United States*, *supra*, 348 U. S. 11, 13, and not on Constitutional grounds.

(4) The appellant was not deprived of due process by the court's denial of an adjournment

Although not obligated to do so in a summary contempt proceeding, the court in the instant case did give the appellant an opportunity to obtain counsel. It denied an adjournment sought on the ground that counsel was otherwise engaged only when it learned that the appellant knew at the time when he retained counsel that counsel would be so unavailable. The disposition of a request for an adjournment lies within the sound discretion of the trial judge. *Avery* v. *Alabama*, 308 U. S. 444 (1940); *Torres* v. *United States*, 270 F. 2d 252 (9th Cir. 1959); *United States* v. *Arlen*, 252 F. 2d 491 (2d Cir. 1958); *People* v. *Jackson*, 111 N. Y. 362 (1888). Surely, due process does not require that a court adjourn a case because of the nonavailability of counsel where the accused knowingly selects an attorney who will not be available. In addition, it must be remembered that the appellant was himself an experienced attorney, and the proceeding merely called for an explanation of his own conduct, a subject no one was better qualified to deal with than he himself. Yet, when the court called upon the appellant to show cause why he should not

be punished for contempt, he replied that he did not wish to participate in the proceedings (163). Nevertheless, he spoke at some length (163-203), and it was in no wise a lack of opportunity which caused him not to present a defense to the charge.

Conclusion

We respectfully submit, therefore, that the appeal should be dismissed because not taken in conformity to the requirements of 28 U. S. C. §1257(2) and because no substantial federal question has been presented.

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